Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1658

In the matter of
OSCAR WALKER ~~Petitioner~~

~~RE:~~

~~SARAH J. IRELAND,~~
~~FORMERLY SARAH J. GALEN~~ ~~Appellee~~

~~VS~~

~~MAURICE J. GALEN~~ ~~Appellant~~

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO.

OSCAR WALKER Petitioner

RE:

SARAH J. IRELAND,
FORMERLY SARAH J. GALEN Appellee

VS

MAURICE J. GALEN Appellant

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Oscar Walker petitions for a writ of certiorari to review the judgment of the Maine Supreme Judicial Court in and for the State of Maine, entered in this case on March 5, 1980 under Federal Rule 24(a).

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court on motion to intervene et application for rehearing by Oscar Walker, Attorney, Appendix A, decided March 5, 1980 is not officially reported. Decision No. 2279, Law Docket No. Pen-78-37.

The opinion of the Maine Supreme Judicial Court is reported at 401 A2d 1002 (1979), decided May 25, 1979, Appendix B.

The decree of the Superior Court, Penobscot County, Civil Action, Docket No. CV-77-69 was entered June 1, 1978, Appendix C.

The judgment of the Maine District Court, District Three, Division of Southern Penobscot, Bangor, Maine (trial court), was entered on January 5, 1977, Civil Action, Docket No. 69 D 73, Appendix D.

JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C. 1257(3).

FURTHER CITATIONS MISCELLANEOUS

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QUESTIONS PRESENTED

1. Whether the judgment of the Maine Supreme Judicial Court, Appendix A, on March 5, 1980, as to the construction of Federal Rules of Procedure and applicability collide with the substantial

rights of the applicant under the provisions of the Fifth and Fourteenth Amendments to the United States Constitution?

2. Did the trial court abuse its discretion in doing nothing under answer to motions dated November 11, 1976 and December 1, 1976, Exhibit A, pages 66-67?

3. Whether the Maine Supreme Judicial Court ought to have vacated the judgment of the trial court, being a matter of law and equal protection under the due process clause of the Fourteenth Amendment to the United States Constitution?

4. Whether the decision of the Superior Court involves an infringement of the Federal Constitution relating to due process?

5. Whether a motion for leave to intervene of right, under Rule 24(a), Federal Rules of Procedure, Exhibit A, with its counterpart in a state may be dismissed under circumstances where limited exceptions exist to the general rule?

6. Whether the Maine Supreme Judicial Court erred in its interpretation of the judgment of the trial court dated January 5, 1977?

7. Whether the judgment in a trial court is a valid one, under Rule 37(b)(2), without trial, under due process clauses of the United States Constitution?

8. Whether a judgment showing stricken portions by a lower court of a motion can be passed over by the highest court of the state?

9. Whether the decision Rule 37(b)(2) as relied upon by the Maine Supreme Judicial Court in the circumstances is questionable where such court in its ultimate wisdom and discern held, inter alios,

"...designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order."?

10. May the highest court of a state dismiss a motion for leave to intervene of right under Federal Rules of Civil Procedure 24(a) when the applicant has such an interest in the matter in litigation that he may either gain or lose by a direct legal effect of the judgment therein whether or not he were a party to the action?

11. Do provisions of Rule 24(a) of the Federal Rules of Procedure provide permissive intervention when an applicant's claim or defense and main action have a question of law or fact in common?

12. Was want of due process raised in the Superior Court?

13. Was want of due process raised in the Maine Supreme Judicial Court?

STATEMENT OF THE CASE

INTRODUCTORY

The proceedings in the state court, Maine District Court, District Three, Division of Southern Penobscot, Civil Action Docket No. 69 D 73, in answer to motions dated November 11, 1976 and December 1, 1976, Exhibit A pages 66-67, in paragraph 13 thereof show want of due process clause of the Fourteenth Amendment to the Federal Constitution, i.e. without notice and without opportunity to be heard. Court docket entries, Exhibit B, Maine District Court, District Three, Division of Southern Penobscot.

Brief and argument of defendant, Exhibit C,

Superior Court, Civil Action, Docket No. 77-69 dated April 1, 1977, page 3, paragraph 8, line 10 shows: "Therefore, if this appeal is not allowed the defendant will not have been allowed to defend an alleged cause of action in the amount of One Thousand Seven Hundred Fifteen Dollars ($1,715.00), without due process of law. He wants to be heard." Also, paragraph 12, first 5 lines thereof show that Maurice J. Galen was not heard on that motion. Again, his substantial constitutional rights were infringed upon and the lower court in complete disregard of Maurice J. Galen's rights issued judgment for $1,715.00 dated January 5, 1977.

The Maine Supreme Judicial Court dismissed intervention of right under Rule 24(a), Exhibit A, and said the District Court had imposed sanctions on defendant pursuant to Rule 37, M.R.C.P. for his failure to respond to a legally effective request for production of records, Exhibit A page 32, (This is not true.) made by the plaintiff and pursuant to Rule 34, M.R.C.P. (This is not true.) Request for production of documents was made under Rule 134, M.R.C.P.

Supra and infra, a fortiorari, and there was no failure to respond to a legally effective request for production of records whether under the Federal Rules of Procedure or under the substantial rules under 134, State of Maine. There is no Rule 134, State of Maine.

On brief to the Maine Supreme Judicial Court, sitting as the Law Court, Exhibit D, Docket No. Pen-78-37, page 3 at statement of issues (5), "The defendant was not heard on the merits of the case." Also page 5 thereof, first paragraph in said argument reads, "It is of high note that all motions to show cause for alleged arrearages of child support in this case were set for hearing on January 10, 1977 at 1:15 p.m. all in accordance with docket entries..." Said judgment was issued in the full amount without notice of judgment." Also page 6 thereof, "Finally, the plaintiff as a matter of law, obtained judgment contrary to law

in such cases made and provided." Also paragraph 4 in toto reads, "Service was improper under said first complaint. Maine Civil Practice, Rule 4(i) reads as follows: "(i) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued." Under Rule 4(i) where the service here is incomplete by plaintiff, an amendment could have filled the deficiency. The plaintiff herein failed to so amend the return of service of complaint dated October 8, 1976. The defendant lost all his substantial constitutional rights thereby, including confusion as to complaint dated October 8, 1976, Exhibit A pages 60-61, and also under court order dated October 14, 1976, Exhibit A page 62, served November 29, 1976. Also page 9 thereof, Exhibit D, last paragraph, "The difficulty of the whole case rests on an apparent denial in the matter of defendant to be heard on the merits of this case. The confusing entries clearly show irregularities and as a legal consequence party defendant is aggrieved thereby, affecting his substantial constitutional rights in the premises."

It is our submission that the decision of the Maine Supreme Judicial Court by its decision of March 5, 1980, Appendix A, on motion to intervene under Rule 24(a) and application for rehearing and decision as reported in 401 A2d 1002 (1979), as applied to law and factual situations, violates the due process clause of the Federal and State Constitutions.

THE FACTS

A CHRONOLOGICAL PERSPECTIVE IS PRESENTED

In Dodd v. Reese, IND- 24 NE(2d) 995, J. Fansler delivered the opinion and said, inter alios, "If the action in which he sought to intervene involved a small bit of land, of little value,

or a horse, or a cow, or a few dollars, he would be held to have an interest in the result, since it might strike down and injure a property right. It seems inconceivable that a court of conscience can say that in this action, the result of which may brand him as guilty of the most despicable conduct, which may destroy his opportunity to earn a comfortable living at his chosen profession, and which may diminish the esteem in which he is held by his friends and neighbors, and cause his family to hold a less respected place in the community, he has no interest, and that he cannot be injured in his substantial rights by the judgment."

Judgment of the trial court under date of January 5, 1977, Appendix D, deleted the following:

> (2) Paragraph 6 of plaintiff's motion shall be taken to be established for purposes of this action, and the defendant, Maurice J. Galen, cannot oppose plaintiff's claim.
>
> "that defendant although heretofore of sufficient means and ability to pay the $1,715.00 toward the support of Michael Leander Galen, the said defendant has neglected and refused to comply with the May 29, 1969 order of judgment of divorce."

This stricken judgment in the lower court is germane to Maine Supreme Judicial Court with respect to its confirmed mandate.

We are submitting that judgment for $1,715.00 was issued. It stops there. We are maintaining judgment by the lower trial court in this case is illegal and contrary to Rule 37(b)(2).

The Maine Supreme Judicial Court held, "Applying one of the sanctions provided by Rule 37(b)(2) the District Court had ruled defendant was in arrears in child support payments was to be taken as established and that defendant was not to be allowed to oppose the claim." In other words, the Maine Supreme Judi-

cial Court had no basis for its contention as to holding the lower court (trial court) did in fact apply sanctions under any Rule of Civil Procedure, State or Federal. Likewise, the Superior Court affirmed this illegal judgment issued by the trial court.

There is no good reason why a court of equity and conscience should permit intervention to protect property against injury that does not apply with at least equal weight and force to reputation. Dodd v. Reese, 216 IND. 449, 24 NE2d 995, 128 ALR 574.

Maine Supreme Judicial Court held, Appendix A, "There is no occasion for any "clarification" of this Court's opinion in support of its mandate." There was clear abuse of discretion in the trial court.

The Maine Supreme Judicial Court by its decision dated May 25, 1979, Appendix B, "We conclude that the failure to comply was without reasonable justification and due to the wilfulness or fact of the appellant (not Mr. Walker), while appellant's non-compliance might have been appropriately dealt with by less extreme sanctions, we cannot say that in these circumstances the District Court abused its discretion." The trial court by its edict never entered, "...failure to comply without reasonable justification and due to the wilfulness or fault of the petitioner herein (Walker)."

Some paraphrasing or compliance of a continued harping on sanctions led the court to have caused it to dismiss the motion for intervention of right under Rule 24(a), Exhibit A. Applying the principle of law as laid down in the Reese case last referred to, the petitioner has a substantial and material interest in sustaining and protecting his good reputation from blemish; and if the decision of the Maine Supreme Judicial Court dated March 5, 1980, Appendix A, is allowed to stand it will, in the language of the New York

Court, "Necessarily reflect upon, and pro tonto, convict him and it will stand forever, and he will be powerless to attach or expunge it." And in light of law, justice or equity, a judgment by this court for further proceedings are in order, in the light of the maxim that "equity will not suffer a wrong to be without a remedy."

THE PROCEEDINGS BELOW

Entry of January 5, 1977, page 2 of docket entries, Exhibit B, in trial court show partial judgment and order that designated facts shall be taken to be established. The word "order" is in the motion. This entry is in non-accordance with the judgment. This may have been the misunderstanding factor from ab initio to finis on March 5, 1980. The trial court entered on January 5, 1977, "It is ordered is due from the defendant the sum of $1,715.00."

On November 18, 1976, notice of motion to show cause, Exhibit A page 65, was filed by attorney, Michael H. Griffin. Hearing set for January 10, 1977 at 1:15 p.m. Judgment for $1,715.00 issued January 5, 1977. Said entry of January 5, 1977 fails to be established, Exhibit A, page 37, lines 7-12. See judgment of trial court January 5, 1977. Said referred to phrase "Partial Judgment shall be taken" stricken.

Allowable, that said judgment is illegal, the Maine Supreme Judicial Court under its watchful eye for protection of individuals under due process clause of the Fourteenth Amendment said, inter alios, "He had an opportunity to explain his non-compliance at the December 17, 1976 hearing." Docket entries, Exhibit B, show all motions continued to January 10, 1977. How could he have had that opportunity? "We conclude that the failure to comply was without reasonable justification and due to the wilfulness or fault of the appellant." Not Walker. No evidence v. Walker, whatsoever. The reading of the mandate is interpreted otherwise. Exhibit A page 17.

THE CONTEXT OF THE PROBLEM

The net effect of the decision by the Maine Supreme Judicial Court under date of March 5, 1980, Appendix A, in said motion for leave to intervene under Rule 24(a) is that applicant, Walker, for intervention under Rule 24(a) has no further right and application for rehearing, under the jurisdiction of the State of Maine. And the same petitioner herein has no possibility of defense whatsoever to defend his substantial constitutional rights under due process clauses as a matter of right. The law court said, inter alios, "There is no occasion for any "clarification" of this court's opinion in support of the mandate." The purpose of the intervention was for clarification.

In Dodd v. Reese (supra), "This case holds that the appellant's contention that he has a substantial and material interest in sustaining and protecting his good reputation from blemish."

In fact, under the decision, "Whatever springes the state may set for those who are endeavoring to assert rights that the state confers the assertion of federal rights when plainly and reasonably made is not to be defeated under the name of local practice." Davis v. Mechsler, 263 U.S. 22, 24, 68 L.ed. 143, 145, 4 U.S.Ct. 13. Justice Ham (1923).

"But whether the claims are based on a federal right or are merely of local concern is itself a federal question, and not the Supreme Court of North Carolina (infra) has the last say. That court could not put a federal claim aside, as though it were not in litigation by the talismanic word "Jurisdiction." When an asserted federal right is denied, the sufficiency of the grounds of denial is for this court to decide." Titus v. Wallick (N. Carolina) 306 U.S. 282, 291, 83 L.Ed. 653, 659, 59 S.Ct. 557.

"It is suggested that the North Carolina Supreme Court did not adjudicate the "merits" of the controversy. It is a misconception of res judicata to assume that the doctrine does not come into operation if a court has not passed on the merits in the sense of the ultimate substantive issue of a litigation." This is the essence of the present case, meaning said motion to intervene under Rule 24(a) of right and application for rehearing were dismissed. "A state court cannot sterilize federal claims by putting on the adjudication a local label."

Maine Supreme Judicial Court in its confirmed mandate on March 5, 1980, Appendix A, regarding motion for leave to intervene under Rule 24(a) of right and application for rehearing said, "We have no jurisdiction therefor to alter our mandate."

Evidently what is meant when a litigant, using the word intervenor, who has raised a Federal Constitutional question has his case dismissed on the ground that the court "has no power to render a judgment" on intervention in the cause of action alleged. Why would not a judgment in the premises such as this strike down any and all merits on constitutional issues?

> "A man's business, occupation, profession or calling is his property and is protected and guaranteed by the Constitution of the United States." Slaughter-House Cases, 16 Wall 36, 21l Ed. 394.

In re Booth Brothers & Hurricane Island Granite Company vs. Albert W. Smith (1916) at page 89, "When a case has been considered and determined by the law court a petition for a review will be only when the court by inadvertence or mistake assumed to be true what the record shows is not true and its decision has been based upon that assumption or has palpably failed to consider facts and a further hearing would be just and equitable."

"It is within the discretionary power of the Equity Court to grant leave to intervene after final decree although such action is unusual. Leave should only be granted at such a state of the proceedings when the interest of the intervenor is direct and immediate, when justice may not otherwise be done, or when it is necessary to take such action to preserve some right which cannot be protected by any other course of procedure." Elston, Jr. et als v. Elston and Company, 131 Me. 149.

The law court ruled its mandate stands. Certiorari was repealed, M.R.S.A. 1967, c. 441, Section 7, effective December 31. Equity and law have become merged.

Maine Revised Statutes Annotated, Title 4 at page 44 (in supplement) motion to Supreme Judicial Court for clarification was viewed as motion for rehearing for purpose of recalling and amending mandate. Hodgdon v. Fuller, (1979) Me., 398 A2d 798.

There was no written testimony in this case.

Page 53 of Title 4, M.R.S.A., Section 57 in amendment section at paragraph 50. "Although caption was entitled "partial judgment" where order of District Court duly entered in docket provided for judgment for plaintiff for the sum of $1,715.00 on execution to issue therefor, forthwith, judgment was a final judgment." Ireland v. Galen (1979) ME. 401 A2d 1002.

Also see Title 4, M.R.S.A., Section 102, Par. 691 (page 57 supplement) shows, "A party seeking relief from a judgment on the ground of mistake, inadvertence, surprise or excusable neglect has the burden of presenting compact evidence from which the court in the exercise of sound judicial discretion, can conclude that the judgment was

entered under circumstances which Rules of Civil Procedure, Rule 60 recognized as justifying vacation of the judgment. Justice Nichols. Laurel Bank and Trust Co. v. Burns, 398 A2d 41 (1979).

Whether it is a case of mistake or neglect the movant under Rules of Civil Procedure, Rule 60, pertaining to vacation of a judgment must make some showing of why he was justified in failing to avoid the mistake or the inadvertence.

"Federal courts in their experience with Rule 60(b) have found it frequently a ready tool for doing substantial justice." As has been well said, "The spectacle of the machinery of the law bearing down mercilessly, and perhaps ruinously to collect and deliver over the fruits of undoubted fraud (or any other matter which equitably vitiates a judgment) is peculiarly odious." Shammas v. Shammas, 9 N.J. 32, 88 A2d 204, 208 (1952).

Rule 60.12 regarding intervention to obtain relief. "Undoubtedly the same relief is now available by intervention after judgment under Rule 24." Maine Rule 60 is substantially identical to Federal Rule 60.

This may be of note. Page 78 Maine Civil Practice, Vol. 2, Note 50, last sentence thereunder, "The party in such a case should seek relief by a motion addressed to the Law Court's inherent power to correct its own obvious error. 50 Id. at 341, 171 A at 256; decision showing that must be made to entitle a party to Law Court relief.

The Law Court said 2nd paragraph, page 1 of Decision No. 2279 on motion to intervene and for rehearing (1980), Appendix A, "Applying one of the sanctions provided by Rule 37(b)(2) the District Court had ruled that plaintiff's allegation that defendant was in arrears in child support payments was to be established," and, "that defendant was not

to be allowed to oppose the claim."

What the record shows is not true of the Law Court's confirmed mandate and its decision has been based upon that assumption or has palpably failed to consider facts consistent with equitable justice. The lower court did not issue an order, "Designated facts shall be taken to be established and that defendant was not to be allowed to oppose the claim."

In answer to motions dated November 11, 1976 and December 1, 1978, Exhibit A pages 66-67, paragraph 12 shows that said motions to that point were continued for hearing by all parties in interest to 1:15 p.m., January 10, 1977.

NATURE OF THE UMBRAGE

Interpretation of Law Court's mandate dated May 25, 1979, last paragraph thereof, raises question against Walker as to justification for allowance of motion for leave to intervene under Rule 24(a) of right, and for rehearing. Communication from Office of Payne & Lynch, 8 Harlow Street, Bangor, Maine 04401, Exhibit A page 17.

Why did not the Maine Supreme Judicial Court pursue the entire record and say that as a part of this mandate the attorney is in no way founded in connection with any wilfulness in failure to produce records. This is the clarification needed. But it did not come forth.

The issues unresolved are whether (1) in the circumstances the applicant for interventional purposes under Rule 24(a) has constitutionally been precluded from rebutting the charges against him, if any; and (2) where the final judgment requirement is specially pertinent when a constitutional barrier is asserted against a state court's decision; and (3) if an applicant for intervention

is not allowed a right to intervene, such denial per se will result in his injury, being an abuse of discretion, resulting in his financial injury, good reputation for honesty and uprightness and fair dealing.

We submit that this court should grant this petition and rule that the basis of this case is in clear violation of due process within the principles of law, the State and Federal Constitutions, and reported cases and stare decisis, too numerous to mention.

"There can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend." Holstead v. Grinna, 152 U.S. 412.

"The cases on laches proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper forum." Galliher v. Cadwell, 1450 U.S. 368.

"Interventor acted promptly as soon as he learned of the interpretation given to the mandate of the Maine Supreme Judicial Court." Elston v. Elston, 131 Me. 149 (1932).

THE OPINIONS BELOW

The due process issue was avoided in the trial court, the Superior Court and in the Maine Supreme Judicial Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

None of the federal questions herein raised have been decided by the Maine Supreme Judicial Court, though presented. All motions in the Maine District Court, trial court, were continued for hearing on January 10, 1977. Yet, judgment in that

court was issued without notice, without hearing, and without opportunity to present arguments, and without notice of issuance of said judgment until time for appeal purposes therefor, 10 days under Maine Civil Practice, had expired.

The jurisdictional importance, interest and the infringement of the applicant's federal rights under the Federal and State Constitutions intensify and augment the outgrowth of the embellishment of a wrong which fell on dead ears; that there is no good reason, for equity and conscience to protect property against injury that does not apply with at least equal weight and force to reputation. Dodd v. Reese (supra).

A federal right has been denied. The Maine Supreme Judicial Court assumed to be true what the record shows is not true; also palpably failed to consider what is just and equitable in the circumstances.

The Law Court, Maine Supreme Judicial Court, has inherent power to correct its own obvious error. See 115 Me. 91, last sentence thereof. "When such a question comes before the court, the question will be considered further." The court thus failed.

A careful, studious and reflective review of the basic judgment dated January 5, 1977 issued by the Maine District Court, District Three, Division of Southern Penobscot, Appendix D, may lack clarity; and as a result did then and there as to its apparent inherent confusion establish a double exposure, in the premises. The stricken portions of that judgment, based further on the infringement of this applicant's rights under the State and Federal Constitutions establish honesty and allow for logic and common sense for the issuance of a writ of certiorari on fundamental legal principles built under the structure of equitable justice and might.

The highest court of the State of Maine, the

law court, set aside and vitiated the applicant's constatutional rights to be heard, under the law.

Intervention of right under Rule 24(a) says, inter alios, "..Anyone shall be permitted to intervene in an action and when the applicant claims an interest relating to the property or transaction of the action may as a practical matter impair or impede his ability to protect that interest."

In finality, this matter supports the applicant's contention that he has a substantial and material interest in sustaining and protecting his good reputation as an attorney from blemish.

To abide by precedents, to say then that Walker will not be financially injured by a judgment based upon solemn determination by the court spells out what is untrue and wrong. Did the law court say that Walker was guilty in failure to comply with Rule 134? There is no slightest scintilla of evidence that the applicant is guilty of any wilful disobedience or disrespect.

The Maine Supreme Judicial Court has a solemn occasion to exercise its inherent power in the circumstances, based on truth. The state's highest court departed from the usual course of judicial proceedings, Rule 19 of this court, and sanctioned and/or stamped a departure from justice as to call for an exercise of this court's power of supervision.

If the judgment in the trial court is allowed to stand, the reputation of the petitioner will be even more wrong, in view of his constitutional rights. The only thing that seems to stand in the way of permitting the petitioner to intervene now, is that it never has been done. But the principle that a stranger may intervene where he has a present substantial and material interest in the result has long been established, and we cannot but conclude that the petitioner has such

an interest here, and that he must be permitted to intervene.

The learned judges of the trial court and the appellate court no doubt felt constrained to follow what seemed the dictates of precedent, but we feel justified in applying a recognized principle under circumstances where it seems never to have been applied before.

"Judgment reversed, with instructions to sustain the appellant's petition to intervene, and for further proceedings." Dodd v. Reese, IND - 24 NE(2d) 995.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

MAINE SUPREME JUDICIAL COURT
Date Opinion Filed:
March 5, 1980

Reporter of Decisions
Decision No. 2279
Law Docket No.Pen-78-37

SARAH J. IRELAND,
formerly SARAH J. GALEN

V.

MAURICE J. GALEN

PER CURIAM

On motions to intervene and for rehearing.

In Ireland v. Galen, Me., 401 A.2d 1002 (1979) decided May 25, 1979, we affirmed a judgment of the Superior Court denying defendant's appeal from an order and judgment of the District Court, District 3, Division of Southern Penobscot. The District Court had imposed sanctions on defendant pursuant to Rule 37, M.R.Civ.P., for his failure to respond to a legally effective request for production of documents made by the plaintiff pursuant to Rule 34, M.R.Civ.P.

Applying one of the sanctions provided by Rule 37(b)(2), the District Court had ruled that plaintiff's allegation that defendant was in arrears in child-support payments was taken as established and that defendant was not to be allowed to oppose the claim. The District Court had then ordered judgment

for arrearages. We held that, in the circumstances the District Court had not abused its discretion. By our mandate, we denied the appeal and affirmed the judgment of the Superior Court affirming the judgment of the District Court.

On February 14, 1980, defendant's attorney filed with this Court what purports to be a "motion for leave to intervene" (apparently in his individual capacity, not in his capacity as attorney for the defendant-appellant in the earlier, unsuccessful appeal), which motion is coupled with an application for rehearing (apparently in his capacity as attorney for the defendant-appellant). The attorney seeks to base his motion for intervention on Rule 24, M.R.Civ.P. Apparently the motion for rehearing is intended as a motion under Rule 75B(a).

With respect to our mandate in Ireland v. Galen, the allegations set forth in the application for rehearing do not recite facts that, if proved, would bring this matter within any of the limited exceptions to the general rule stated in Ginn v. Penobscot Co., Me., 342 A.2d 270, 274 (1975), as follows:

> Absent a statutory or rule provision to the contrary, the general rule is that, after an appellate court has determined the issues involved in the case submitted to it and caused its judgment in conformity with such determination to be entered and the case, together with the rescript of decision, to be remanded to the lower court, the appellate court thereafter has no power to reconsider, alter, or modify its decision. An appellate court, generally speaking, is without power to recall a mandate regularly issued for the purpose of correcting judicial error.

In Ginn, certain very limited exceptions to the general rule barring recall of a mandate were delineated:

> We believe that the general rule . . . stands modified . . . to the extent of permitting the Law Court to protect the integrity of its own processes and allowing it to implement the generally recognized exceptions to the general rule. Indeed, an appellate court does not lose jurisdiction of the case and may recall its mandate for the purpose of correction, where there has been some irregularity of error in its issuance, as where it was issued contrary to the rules of the court, or where, by reason of a clerical mistake, it does not correctly express the judgment of the court (Kasal v. Kasal, 1949, 228 Minn, 570, 37 N.W.2d 711); as where the judgment transmitted by the appellate court, because of inadvertent error, mistake, fraud, or lack of jurisdiction, was not in fact the judgment of the court (Kosten v. Fleming, 1943, 17 Wash.2d 500, 136 P.2d 449).
> Ginn v. Penobscot Co., supra at 275.

This case does not fall within any of the exceptions. We have no jurisdiction, therefore, to alter our mandate. Tyson v. Whitaker & Son, Inc., Me., A.2d (Decision No. 2265, Law Docket No. Cum-79-15, Feb. 20, 1980).

There is no occasion for any "clarification" of this Court's opinion in support of the mandate. The opinion states clearly the Court's reasons for deciding that the District Court had not abused its discretion and that its judgment should be upheld.

The application for rehearing is therefore dismissed. Tyson v. Whitaker & Son, Inc., supra.

Since Ireland v. Galen is no longer before this Court, the petitioner's motion to intervene in that litigation must also be dismissed. It is unnecessary to determine whether petitioner would have had any standing to intervene if the Law Court still had jurisdiction over the controversy.

The entry is:

Motion for rehearing dismissed.

Motion to intervene dismissed.

Archibald and Delahanty, JJ., participated in the decision in this case but retired prior to the filing of the motions to intervene and for rehearing. They have joined the opinion as Active Retired Justices.

McKusick, C.J.; Wernick, and Godfrey, JJ., Archibald, and Delahanty, A.R.JJ.'s, concurring.

APPENDIX B

Date Opinion Filed:
May 25, 1979

Reporter of Decisions
Decision No. 2062
Law Docket No. Pen-78-37

SARAH J. IRELAND,
FORMERLY SARAH J. GALEN

v.

MAURICE J. GALEN

GODFREY, J.

Plaintiff-appellee Sarah Ireland was granted a divorce from defendant-appellant Maurice Galen by judgment entered in the District Court, District Three, Division of Southern Penobscot, on May 29, 1969. As a part of the divorce decree, the District Court awarded custody of the one minor child of the parties to the appellee and ordered appellant to pay for the support of that child in the amount of $10.00 per week.

On October 14, 1976, appellee filed a motion in the District Court alleging that appellant was in arrears of child support in the amount of $1715.00. On the same day, she obtained a court order from the District Court directing that notice of a hearing on the motion, scheduled for November 5, 1976, be given appellant by serving him with an attested copy of the motion and order. Appellant was served

on October 19, 1976, but return of service indicated that an unattested copy was used. He was served, also on October 19, 1976, with a request for production of specifically described documents pursuant to Rule 34, M.R.Civ.P. Appellant responded on October 27, 1976 by moving to dismiss the motion for arrearages on the ground that service was not made by attested copy as ordered. Appellee then filed a second motion for arrearages, substantially identical to the first, on November 18, 1976. Service on appellant was made by attested copy on November 29, 1976. Hearing on this motion was scheduled for January 10, 1977. Appellee did not re-serve her request for production of documents.

On December 1, 1976, appellee filed a motion requesting the imposition of sanctions pursuant to Rule 37(d)(3), M.R.Civ.P., for appellant's failure to respond to the request for production of documents. Specifically, the motion asked for an order under Rule 37(d)(3), M.R.Civ.P., that the fact that defendant owed plaintiff $1715 in arrearages be taken to be established, and for an order refusing to allow defendant to oppose plaintiff's claim. Hearing on this motion was scheduled for December 17, 1976. It is not clear from the record what happened on December 17, except that both parties appeared and filed memoranda of law.

By order, dated January 5, 1979, designated "Partial Judgment and Order that Designated Facts shall be taken to be Established," the District Court granted plaintiff's December 1 motion for sanctions, ruling that plaintiff's allegation that defendant was in arrears in child support payments in the amount of $1715 was to be taken as established and that the defendant was not to be allowed to oppose the claim. In addition, the District Court judge wrote on the order, "Judgment for plaintiff for said sum of $1715.00-- execution to issue therefor forthwith." That judgment was entered in

the District Court docket on January 5, 1977.

Defendant Galen appealed to the Superior Court pursuant to Rule 73(a), D.C.Civ.R. From a judgment of the Superior Court denying the appeal, defendant again appeals. We deny the appeal.

Appellee contends that the District Court order did not constitute a final judgment. Although the caption was entitled "Partial Judgment," the order of the District Court, duly entered in the docket, was plainly a judgment. We do not see what could be more final than "Judgment for plaintiff for said sum of $1715.00--execution to issue therefor forthwith."

Rule 34(a), M.R.Civ.P., applicable through Rule 34, D.C.Civ.R. states that "[a]ny party may serve on any other party a request (1) to produce ... any designated documents... ." Appellant does not challenge the sufficiency of service, on October 19, of appellee's request for production of documents. However, appellant contends that the request for production of documents had no legal effect, on the theory that the October 8 motion for arrearages had not been properly served. Appellant's position is that, although an attested copy is not usually required (see 1 R. Field, V. McKusick & L. Wroth, Maine Civil Practice § 4.4 (2d ed. 1970), where, as here, a court order requiring service by attested copy is obtained, the court order must be followed. When the motion was re-served by attested copy on November 29, 1976, appellant argues, a new request for production of documents had to be made.

Appellant's argument overlooks the fact that the jurisdiction acquired by the District Court over the present parties in their 1969 divorce action is a continuing one with respect to custody or support of their minor child. Baril v. Baril, Me., 354 A.2d 392

(1976). As stated by 2 R. Field, V. McKusick & L. Wroth, Maine Civil Practice § 80.4 at 278 (2d ed. 1970).

> "A divorce action always remains pending to modify provisions of the divorce judgment with respect to support and custody of minor children and alimony... ."

Thus, the right of appellee to file her Rule 34(a) motion did not depend upon the commencement of a proceeding for enforcement or modification of the divorce judgment. It was properly filed in a pending action. The divorce decree of the District Court, incorporating a support order, remained in force on October 19, 1976, when the request for production of documents was served. Consequently, that request was properly served on a "party" in compliance with Rule 34(a), M.R.Civ.P.

The request for production of documents being legally effective, the question before us is whether the District Court abused its discretion in imposing sanctions for defendant's failure to respond. Rule 37(d)(3), M.R.Civ.P., provides that if a party fails to serve a written response to a request for production after proper service of the request, the court may make such orders in regard to the failure as are just, including any action authorized by paragraphs (A), (B), and (C) of Rule 37(b)(2). Paragraph (A) of subsection (b)(2) permits a court order that designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order. Paragraph (B) permits, among other things, a court order prohibiting the disobedient party from opposing designated claims. Paragraph (C) permits, among other things, a court order rendering a judgment by default against the disobedient party. The plaintiff had clearly designated, in

her motion of December 1, the facts and claims she sought to establish. Thus the sanctions invoked by order of the District Court, though severe, were expressly authorized by rule.

The federal courts have held that Rule 37, F.R.Civ.P., virtually identical to Rule 37, M.R.Civ.P., grants broad discretionary powers to the trial judge to impose sanctions for failure to comply with discovery orders and requests, notwithstanding the requirement that the "court make such orders as are just." Denton v. Mr. Swiss of Missouri, Inc., 564 F.2d 236 (8th Cir. 1977). However, where severe sanctions such as dismissal or default are imposed, the range of discretion is more narrow. Fox v. Studebaker-Worthington, Inc., 516 F.2d 989 (8th Cir. 1975). "[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Societe Internationale v. Rogers, 357 U.S. 197, 209 (1958). Consequently, dismissal or entry of default judgment pursuant to Federal Rule 37 has been permitted only where the noncompliance has been due to wilfulness, bad faith or fault of the party sanctioned. Societe Internationale v. Rogers, supra; Wilson v. Volkswagen of America, Inc., 561 F.2d 494 (4th Cir. 1977), cert. denied, 434 U.S. 1020 (1978); Grace v, Fisher, 355 F.2d 21 (2nd Cir. 1965). This standard is applicable to sanctions ordered under Federal Rule 37(d) for noncompliance with discovery requests as well as those imposed under Rule 37(b) for noncompliance with court orders. Fox v. Studebaker-Worthington, Inc., supra.

In the present case, appellant concedes that the documents requested were in his possession. He does not submit any justification for his failure to comply except for his argument, which we have

rejected, that the discovery request was not served on a party. The proper course for asserting that defense would have been to move for a protective order, pursuant to Rule 26(c), M.R.Civ.P. In fact, Rule 37(d) expressly provides:

> "The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c)."

Nor can appellant claim that he was unfairly surprised by the District Court's order since he had previously served with a motion requesting that sanctions be imposed. He had an opportunity to explain his noncompliance at the December 17, 1976, hearing.

We conclude that the failure to comply was without reasonable justification and due to the wilfulness or fault of the appellant. While appellant's noncompliance might have been appropriately dealt with by less extreme sanctions, we cannot say that, in these circumstances, the District Court abused its discretion.

The entry is:

Appeal denied.

Judgment affirmed.

POMEROY and NICHOLS, JJ., did not sit.

McKusick, C.J.; Wernick, Archibald, Delahanty, JJ., concurring.

APPENDIX C

STATE OF MAINE
PENOBSCOT, SS.

SUPERIOR COURT

Civil Action
Docket No. CV-77-69

SARAH J. GALEN, now SARAH J. IRELAND of Brewer, County of Penobscot, State of Maine

Plaintiff

vs

MAURICE J. GALEN of Columbia Falls, County of Washington, State of Maine

Defendant

DECREE

Oral argument was held on February 10, 1979 on the Defendant, Maurice J. Galen's Appeal from a PARTIAL JUDGMENT AND ORDER THAT DESIGNATED FACTS SHALL BE TAKEN TO BE ESTABLISHED which Partial Judgment and Order was dated January 5, 1977 and was granted by the Maine District Court, District Three, Division of Southern Penobscot, Civil Action Docket No. 69 D 73. It is hereby ORDERED that the Defendant's Appeal is DENIED and this case shall be remanded to said District Court.

June 1, 1978

Ian MacInnes
Presiding Justice
Superior Court

APPENDIX D

STATE OF MAINE — DISTRICT COURT
DISTRICT THREE
Division of Southern Penobscot
Civil Action, Docket No. 69 D 73

SARAH J. IRELAND, formerly SARAH J. GALEN, of Brewer, County of Penobscot, Maine,

PLAINTIFF

vs

MAURICE J. GALEN, of Columbia Falls, County of Washington, Maine

DEFENDANT

PARTIAL JUDGMENT AND ORDER THAT DESIGNATED FACTS SHALL BE TAKEN TO BE ESTABLISHED

On October 19, 1976, personal service of a Notice of Motion to Show Cause and for Arrears of Child Support, a Subpoena duces tecum, and a Request for Production of Documents were all served in hand upon the Defendant, Maurice J. Galen.

A Motion for an Order that Designated Facts shall be Taken To Be Established for the Purposes of the Action; Motion for Order Refusing to Allow the Delinquent Party to Oppose Designated Claims; Motion for an Order Dismissing Defendant's Motion for Change of Custody; Motion to Recover Counsel Fees was heard before this District Court on December 17, 1976.

The Court finds that Defendant has not responded to said Request for Production served on October 19, 1976 and has continued not to respond to said Request for Production.

It is hereby ORDERED and decreed that because the Defendant has failed to serve a written response to the Request for Production served on October 19, 1976 and submitted under Rule 34, after proper service of said request, the Court orders pursuant to Rule 37(d) (3) that:

(1) Paragraph 5 of Plaintiff's Motion shall be taken to be established for purposes of this action, and the Defendant, Maurice J. Galen, cannot oppose Plaintiff's claim:

> That Plaintiff, Sarah J. Ireland, is due from the Defendant, Maurice J. Galen, the sum of One Thousand Seven Hundred Fifteen Dollars ($1,715.00) to and including the date of Petition to Show Cause and for Arrears of Child Support. [Handwritten by Judge Pilot - judgment for Pl for said sum of $1715.00 - exec to issue therefor forthwith].

~~(2) Paragraph 6 of Plaintiff's Motion~~ shall be taken to be established for purposes of this action, and the Defendant, Maurice J. Galen, cannot oppose Plaintiff's claim:

> that Defendant although heretofore of sufficient means and ability to pay the $1,715.00 toward the support of Michael Leander Galen, the said Defendant has neglected and refused to comply with the ~~May 29, 1969 order of judgment of divorce.~~

It is further ORDERED that the Defendant, Maurice J. Galen, pay to Michael H. Griffin,

Esq., Attorney for Plaintiff, as counsel fees the sum of Seventy-five Dollars ($75.00) for the prosecution of this motion. [Handritten by Judge Pilot - execution to issue therefor forthwith].

Dated: 1/5/77

Morris G. Pilot
JUDGE, MAINE DISTRICT COURT

ADDENDA TO PARTIAL JUDGMENT

All motions in the trial court were continued to January 10, 1977. Factually, plaintiff's attorney filed a motion under date of December 1, 1976 showing five motions under one document as of that date. These five particular motions under said date were not entered until December 16, 1976.

Without hearing, without opportunity to present a defense, and unknown to defendant the court struck in its judgment, "designated facts shall be taken to be established for purposes of this action"; struck paragraph (2) on page 2 of said judgment and including paragraph 6 of said motion. This is incomprehensible.

The order reflects on page 2 of the judgment that the words, "cannot oppose plaintiff's claim" is also stricken. Substantially, if the judgment were a valid judgment that particular judgment was issued in violation of the known and substantial rights of the petitioner under motion to intervene under rule 24 et application for rehearing adjudicated by the Honorable the Maine Supreme Judicial Court on March 5, 1980.

The above addendum is reflected in the court entries. There were no sanctions in this case whatsoever.